IN THE HIGH COURT OF BOMBAY AT GOA

WRIT PETITION NO. 480 OF 2005

1. Shri Sripad C. Madkaikar,

2. Smt. Vasanti C. Madkaikar,

3. Shri Datta C. Madkaikar,

4. Shri Sunil C. Madkaikar ... Petitioners.

V/s.

1. Datta Apartments Co-operative Housing Society Ltd.

2. Shri Mark A.T.Cordeiro. ... Respondents.

S.N.Joshi for the petitioners.

V.A.Lawande for the respondents.

CORAM : V.C.DAGA AND

DATED : 24th August 2006.

ORDER :

The learned counsel for the petitioners seeks permission to delete certain paragraphs

from the amendment application (Exh.D) at page 40 of the petition. He is permitted to delete the paragraphs as prayed. Amendment to be carried out during the course of the day.

2. Heard learned counsel for the rival parties.

Facts :

3. This petition is directed against the order dated 30th July, 2005 passed on Civil Misc. Application No.272/2004/A in Special Civil Suit No.166/2003/A, whereby the application for amendment came to be rejected for the reasons recorded in the order holding that the proposed amendment is not bonafide as such amendment to the original plaint could not be permitted. The Court below in support of its order relied upon the judgment in the case of ***Ganashi Rai v. First Addl. District Judge***, AIR 1992 Ahmadabad 25.

4. This matter was heard by this Court on more than two occasions. During the

course of hearing, lot many paragraphs of the proposed amendment were found to be unnecessary. The same were brought to the notice of the learned counsel appearing for the petitioners. With the result, learned counsel for the petitioners, after taking instruction, filed purshis on record seeking permission to delete unnecessary paragraphs. The deletion has been allowed by this Court. That is how, after deletion of unnecessary paragraphs from the proposed amendment, the petition is taken up for hearing.

Submissions :

5. The learned counsel for the petitioners submits that the amendment to the plaint is necessary in order to clarify some of the pleadings which are already on record. He further submits that the proposed amendment is not going to change the nature of suit. He further submits that the law on amendment is well settled. According to him, allowing application for amendment is a rule and refusal is an exception. He placed reliance on the judgment of the Apex Court in

the case of ***Jai Jai Ram Manoharlal*** *v.* ***National Building Material Supply***, AIR 1969 SC 1267; ***Raghu Thilak D. John v. S.Rayappan***, (2001) 2 SCC 472; ***Estralla Rubber v. Dass Estate (P) Ltd.***, AIR 2001 SC 3295; ***Sampath Kumar v. Ayyakannu***, AIR 2002 Sc 3369; ***Pankaja v. Yellappa***, AIR 2004 SC 4102 to contend that where the amendment does not constitute addition of a new cause of action or raise a different case or affect nature of suit, the amendment can very well be allowed. Reliance is also placed on some of the judgments of this Court in case of ***Hari Shankar Singhania v. Dr.Gauri Hari Singhania***, 2003 (1) ALL MR 548 and ***Anant Tukaram Patil v. Lata Eknath Patil***, 2004 (4) ALL MR 182.

6. Per contra, Mr.Lawande, learned counsel for the respondents/ original defendants submits that the prayer for amendment is not bonafide; and that the proposed amendment is certainly going to change the nature of suit. He further tried to point out that the amendment, though apparently seems to be in the nature of

clarification, but, in fact, a new case is being made out in the garb of amendment. He further submits that the suit itself is not maintainable and, therefore, amendment should not be granted. He further tried to support the order of the trial Court on the basis of the reasons mentioned therein.

Consideration :

7. Having heard rival parties and having examined the text of the amendment, it is true that when the original amendment application was moved before the trial court, some of the paragraphs in the proposed amendment were unnecessary. However, during the course of hearing when this fact was brought to the notice of the learned counsel for the petitioners; he, on instruction, readily agreed and, accordingly, deleted some of the paragraphs which were unnecessary and had an effect of introducing a new cause of action. After deletion; what remained is explanatory or clarificatory pleadings, seeds of which are already on record in the form of plaint pleadings.

8. The law with regard to amendment is well settled. Some of the judgments in this behalf can be referred to bring home this view.

9. The Apex court in the case of ***A.K.Gupta & Sons Ltd. v. Damodar Valley Corpn.***, AIR 1967 SC 96 : (1966) 1 SCR 796 held:

> "The general rule, no doubt, is that a party is not allowed by amendment to set up a new case or a new cause of action particularly when a suit on new case or cause of action is barred: Weldon Vs. Neal, (1987) 19 QBD 394 : 56 LJQB 621. But it is also well recognised that where the amendment does not constitute the addition of a new cause of action or raise a different case, but amounts to no more than a different or additional approach to the same facts, the amendment will be allowed even after the expiry of the statutory period of limitation (see Charan Das Vs. Amir Khan, AIR 1921 PC 50:ILR 48 Cal 110 and L.J.Leach and Co.Ltd. Vs. Jardine Skinner and Co., AIR 1957 SC 357:1957 SCR 438.
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> The principal reasons that have led to the rule last mentioned

> are, first, that the object of courts and rule of procedure is to decide the rights of the parties and not to punish them for their mistakes (Cropper v. Smith (1984) 26 ChD 700: 53 LJCH 891 : 51 LT 729) and secondly, that a party is strictly not entitled to rely on the statute of limitation when what is sought to be brought in by the amendment can be said in substance to be already in the pleading sought to be amended (Kisandas Rupchand Vs. Rachappa Vithoba Shilwant, ILR (1909) 33 Bom 644 : 11 Bom LR 1042 approved in Pirgonda Hongonda Patil Vs. Kalgonda Shidgonda Patil, AIR 1957 SC 363 : 1957 SCR 595"

10. In ***Ganesh Trading Co. v. Moji Ram***, (1978) 2 SCC 91, the Apex court has held as under :

> "4. It is clear from the foregoing summary of the main rules of pleadings that provisions for the amendment of pleadings subject to such terms as to costs and giving of all parties concerned necessary opportunities to meet exact situations resulting from amendments, are intended for promoting the ends of justice and not for defeating them. Even if a party or its counsel is inefficient in setting out its

> case initially the shortcoming can certainly be removed generally by appropriate steps taken by a party which must no doubt pay costs for the inconvenience or expense cause to the other side from its omission. The error is not incapable of being rectified so long as remedial steps do not unjustifiably injure rights accrued."

11. In the above teeth of law laid down by the Apex Court, proposed amendment being clarificatory in nature is liable to be allowed. Impugned order is liable to be set aside. The petitioners are liable to be permitted to carry out amendment in the plaint. In the result, impugned order is set aside. Petitioner is directed to carry out amendment in the plaint within fifteen days from the date of receipt of copy of this order.

12. It is needless to mention that after the amendment of plaint, it would be obligatory on the part of the plaintiffs to serve amended copy of the plaint on the defendants. The defendants would be at liberty to apply for consequential amendment

either by amending their written statement, if already filed or may file consolidated written statement on record.

13. In the result, petition is allowed. Rule is made absolute in term of this order, however, subject to payment of costs quantified in the sum of Rs.3,000/-. The amount of costs to be deposited in the trial Court within one week from the date of receipt of copy of this order for being paid to the respondents/ original defendants.

(V.C. DAGA, J.)

skn/-